No. 94-7

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
NORTH BRANCH ENERGY PARTNERS, L.P. and
MON VALLEY ENERGY CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

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1. Both respondents argue that the Court should decline to issue a writ of certiorari because the first decision of the Commonwealth Court, which the Pennsylvania Supreme Court declined to review on February 3, 1992, was a final judgment for purposes of 28 U.S.C. § 1257, and therefore this Petition was not timely filed. A corollary to that argument, also urged by both respondents, is that petitioners waived the federal questions at issue by not raising them again in the courts below after remand. *See* PUC Opp. at 16-20; North Branch Opp. at 6-14.

Respondents rely upon *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), for the proposition that the

1992 decision of the Pennsylvania Supreme Court was final for purposes of this Court's jurisdiction under § 1257. Specifically, respondents argue that after the *Burgettstown I* decisions, the outcome of further proceedings in the Pennsylvania tribunals was "preordained," and therefore petitioners had a right to petition for certiorari immediately after the 1992 decision. Indeed, respondents point out that these petitioners have relied upon the *Cox* exceptions when asserting jurisdiction under similar circumstances in the related *Milesburg* (No. 93-1341) and *Shannopin* (No. 93-1535) petitions, now pending before this Court. As North Branch sees it, the Court must dismiss either this petition or the petition in *Milesburg*, because "[e]ither both orders of the Pennsylvania Supreme Court were final and ripe for review under § 1257, or neither order was final." North Branch Opp. at 13. The PUC expressly disagrees with the contentions of the project developer respondents in *Milesburg* and *Shannopin* that the decisions there sought to be reviewed are not final. PUC Opp. at 20 n.15.

Respondents have presented a false dichotomy. This Court never has held that the presence of jurisdiction under one of the *Cox* exceptions *requires* that a petition be filed within 90 days of the first state court decision. *See* Robert L. Stern et al., *Supreme Court Practice* 105 (7th ed. 1993). Rather, in certain circumstances, the *Cox* exceptions *permit* this Court to exercise jurisdiction notwithstanding the contemplation of further proceedings in the lower courts. This Court has held, both before and after *Cox*, that " '[w]e have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . . and our right to reexamine such questions is not affected by a ruling that the first decision of the state court became the law of the case. . . .' " *Hathorn* v. *Lovorn*, 457 U.S. 255, 261 (1982) (quoting *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955)). Accordingly, on a number of occasions, this Court has accepted jurisdiction over the second state court judgment even when the federal issue was decided

in earlier state proceedings in the same case. *E.g.*, *Gant* v. *City of Oklahoma City*, 289 U.S. 98, 100-01 (1933) (Court had jurisdiction over second state appeal even though federal issue was decided in an earlier appeal from an interlocutory injunction); *Urie* v. *Thompson*, 337 U.S. 163, 172-73 & n.12 (1949) (Court has "power to probe issues disposed of on appeals prior to the one under review").

Respondents' notion of finality, if accepted, would create an untenable dilemma for prospective petitioners faced with a remand order from a state court of last resort. If faced with this dilemma, most lawyers would file petitions for certiorari merely to preserve their rights, lest the Court later decide that the first decision was "final" under *Cox*. Such practice would inundate this Court with unnecessary petitions for certiorari. *See Cox, supra*, 420 U.S. at 511-12 (Rehnquist, J., dissenting). Lawyers who failed to file after the first state decision would face a severe penalty for guessing incorrectly. And, as the principal commentators on Supreme Court practice have written, "Finality is too practical a doctrine to be turned into such a trap for litigants and such an erosion of the Court's jurisdiction to pass on substantial federal claims in state court cases." *Supreme Court Practice, supra*, at 105.

2. Respondents also argue that petitioners waived their right to assert federal claims because on remand they argued that West Penn had no need for capacity as of October 15, 1987—the date fixed by the Commonwealth Court in *Burgettstown I*—without expressly reiterating their arguments that federal law both barred the PUC from abrogating the milestone dates and set the date of the legally enforceable obligation in September 1989, the date of the PUC's modification order. In fact, petitioners did preserve their arguments on remand. *See, e.g.*, PUC Opp. at 12 n.13. But this Court's jurisdiction derives primarily from the Pennsylvania tribunals' decisions on federal issues in *Burgettstown I* and this Court's "power to probe issues disposed of on appeals prior to the one

under review." *Urie* v. *Thompson, supra,* 337 U.S. at 172.

The PUC's Opposition fully demonstrates why petitioners have not waived any arguments before this Court. In the space of a few paragraphs, the PUC argues both that petitioners were "barred [by the law of the case doctrine] from raising [on remand] issues conclusively decided" in *Burgettstown I,* and also that petitioners "failed even to attempt to preserve this issue on remand." PUC Opp. at 17-18. Respondent PUC apparently believes that petitioners were required to raise again in state court an issue that, according to the PUC, state law barred them from raising.

This Court's jurisdiction is not predicated on such pointless requirements. In the first place, it is settled that a state court's reliance on the law of the case doctrine in an appeal after remand does not preclude this Court from exercising jurisdiction over the issues decided in the first appeal. *Hathorn* v. *Lovorn, supra,* 457 U.S. at 261-62 (collecting cases). Moreover, this Court has held that a possible application of the law of the case doctrine on remand does *not* necessarily constitute justification for seeking immediate review. *California* v. *Rooney,* 483 U.S. 307, 311-14 & n.2 (1987). Accordingly, there is no merit to the PUC's argument that the petitioners were required by Pennsylvania's law of the case doctrine to seek review after *Burgettstown I,* or to forgo seeking this Court's review of the federal questions decided in this case.

Moreover, in *Burgettstown II,* the Commonwealth Court reaffirmed its prior judgment and explained why that judgment was properly entered *under federal law. See* App. C, at 11a n.4.* As this Court has held, when

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* Contrary to the assertion in North Branch's Opposition, petitioners have not "acknowledge[d] that the issues presented here were not considered by the Commonwealth Court in its *Burgettstown II* order." North Branch Opp. at 8. Petitioners merely acknowledged that the *focus* of the *Burgettstown II* appeals was on the failure of

a state appellate court indicates that it considered the issues in a prior appeal "and simply refused to reconsider its previous decision in the second appeal, those claims are properly before us." *Barclay* v. *Florida*, 463 U.S. 939, 946 (1983); *see Reece* v. *Georgia*, 350 U.S. 85, 87 (1955). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257 to entertain the issues of federal law presented by the Petition.

3. Respondent PUC also contends that the petitioners did not raise one of their federal claims—that the legally enforceable obligation did not accrue until the PUC issued its September 29, 1989, modification order—in the *first* Burgettstown proceeding. *See* PUC Opp. at 6-7. Indeed, the PUC states that "[i]n neither [*Burgettstown*] case did the Commonwealth Court 'reject' a contention that rates should be calculated as of September 29, 1989, the date of the modification order, because nobody made that argument." PUC Opp. at 7.

The PUC's assertion is demonstrably false. In its initial brief before the Commonwealth Court in *Burgettstown I*, West Penn argued:

> The attempted modification of the North Branch EEPA by the PUC is in substance an order requiring West Penn to enter into a new mandated PURPA contract. The record is completely devoid of evidence addresed to the findings required by the FERC regulations for the entry of such an order, *i.e.*, (1) the determination of the time when North Branch's legally binding obligation under such new mandated contract arose, and (2) the determination of West Penn's avoided costs as of the time such legally enforceable obligation was incurred.

Definitive Brief for Petitioner West Penn Power Company, at 27, Nos. 2097 & 2090 C.D. 1989 (Commw. Ct. Pa. Mar. 23, 1990) (relevant pages attached hereto in Supplemental Appendix A, at 2a-3a). West Penn's argu-

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the PUC to accept West Penn's evidence that it had no need for capacity on October 15, 1987. Petition at 18.

ment on this issue, which was separated into a single section in its Brief, also referred the Court to a discussion of the issue in its brief in the *Milesburg* case, which was then pending before the Commonwealth Court. *Id.* at 3a. West Penn also pressed this issue in its Reply Brief in the Commonwealth Court. *See* Supplemental Appendix B, at 4a-6a. The Commonwealth Court, by ruling in *Burgettstown I* that the date of the legally enforceable obligation was set at October 15, 1987—the date of contract execution—necessarily considered and rejected West Penn's argument that the modification order itself was, in substance, an order requiring West Penn to enter into a new PURPA contract. Hence there is no merit to the PUC's contention that petitioners did not raise this issue in *Burgettstown I*.

4. Like the respondents in the *Milesburg* and *Shannopin* Petitions, the respondents in this case argue that Pennsylvania's implementation of PURPA is, at worst, a desirable manifestation of the "flexibility" among state interpretations of PURPA that Congress intended. *See* PUC Opp. at 26; North Branch Opp. at 18-20. Respondents do not cite any relevant statutory language or history evidencing that Congress intended a flexible implementation by the states of PURPA § 210, and their arguments are fully rebutted in Petitioners' Reply Memorandum in *Milesburg*, No. 93-1341, at 4-5. In addition, petitioners submit that respondents' consistency and certitude in proffering their "flexibility" argument further illustrates why this Court should grant certiorari and resolve the issues raised by the three related Petitions.

What perplexes petitioners about respondents' argument is why PURPA § 210, of all federal laws, must be implemented by the states with "flexibility." The Constitution is federal law, but it does not apply flexibly. To be sure, a New York state court may interpret the Fourth Amendment differently than a California court, but the difference does not obtain because the two courts believe that local conditions require a different application of federal law.

PURPA is *federal* law. Just as state courts must apply the federal Constitution, they also must apply PURPA § 210. Under PURPA, however, their job is more difficult, because interpretive guidance from the federal courts is rare. Petitioners submit that respondents' premise—that federal law should be applied flexibly by state tribunals—is a momentous departure from ordinary principles of federalism. Nothing in *FERC* v. *Mississippi*, 456 U.S. 742 (1982), suggests that Congress effected such a fundamental change in the normal relations between state and federal law when it enacted PURPA § 210. Indeed, *FERC* v. *Mississippi* reaffirms the principle, set forth in *Testa* v. *Katt*, 330 U.S. 386 (1947), that state courts have an obligation to uphold federal law. As this Court stated, "the policy of the federal Act is the prevailing policy in every state" and "should be respected accordingly in the courts of the State." *FERC* v. *Mississippi*, 456 U.S. at 760 (internal quotations and citations omitted).

In effect, respondents' argument suggests that state courts applying PURPA have the power to create "federal common law," and that inconsistencies in that law across the nation are both expected and desired. Even if respondents are correct, this Court should accept jurisdiction over this case and pronounce, in unmistakable terms, that Congress intended each state to develop its own common law in implementing PURPA § 210.

5. The PUC continues to create confusion concerning the avoided cost rate calculations required by PURPA and sought by petitioners. Petitioners are *not* asserting that the rates set by the PUC are "far in excess of" West Penn's avoided capacity costs because "West Penn has found a source of electric generation that costs *nothing* to build." PUC Opp. at 6 (emphasis in original). Rather, West Penn, as of the date of the PUC's modification order in September, 1989, clearly had *no need* for *any* additional base load capacity. Yet the PUC has required West Penn to purchase base load capacity from North Branch, at prices reflecting the avoided capacity

costs of building a large base-load plant, when West Penn would not build such a plant to serve its own needs. It is in that sense that North Branch will recover a "windfall" from the PUC's rate orders entered in this case; and it is for that reason that West Penn's customers will be subjected to massive overpayments for the capacity West Penn is required to purchase from North Branch.

The PUC's additional observation, Opp. at 29 n.17, that it has been presented by West Penn "with at least three different dates for finding a 'zero' capacity need," is further rhetorical nonsense. West Penn's consistent position, since April, 1989, when North Branch first moved to modify its contract, has been that it had no need for the additional capacity contemplated by the Burgettstown project, the Shannopin project, or the Milesburg project, as of *any* relevant date after October 15, 1987—including the date of the modification order eventually entered in the Burgettstown proceedings on September 29, 1989.

6. Respondent North Branch implies that a decision by this Court is not required to resolve the federal issues in dispute because petitioners could have raised their federal issues in other federal forums. North Branch Opp. at 20-21. North Branch principally contends that petitioners could have sought an "interpretive ruling" from FERC's general counsel. Petitioners have addressed this argument fully in their Reply Memorandum in *Milesburg*, No. 93-1341, at 3-4.

North Branch also suggests that petitioners could have litigated their claims in federal court under PURPA § 210(h)(2)(B), first by petitioning FERC to enforce the implementation of its rules in Pennsylvania, and then by filing an action in federal district court if FERC failed to act. North Branch has failed to take into account the fact that FERC itself apparently has determined that § 210(h)(2)(B) does not permit enforcement proceedings when the state "rule" at issue is a decision rendered in an adjudicative proceeding.

Although North Branch correctly observes that FERC initially stated that it would be available for enforcement proceedings arising from state rules implemented on a case-by-case basis, Opp. at 21, it fails to consider FERC's subsequent policy statement attempting to clarify its role under § 210(h) and to define "the relationship of its enforcement authority to State judicial enforcement authority." FERC Statement of Policy, Docket No. PL83-4-000, 48 Fed. Reg. 29475, 29476 (June 27, 1983). After noting that Congress had created "an apparently ambiguous statutory enforcement scheme," FERC concluded that "once the State regulatory authorities . . . have appropriately implemented [FERC's] regulations, [FERC's] role is limited regarding questions of the proper application of [its] rules on a case-by-case basis." *Id.* After a state implements a "plan" consistent with PURPA, FERC believes that the state tribunals are the appropriate forums for litigants. *Id.* At least one federal court has agreed with FERC's interpretation of the statute, and has held that federal district courts lack subject matter jurisdiction after a state (or nonregulated utility, in that instance) has devised an implementation plan "that is consistent on its face with FERC's regulations." *Greensboro Lumber Co.* v. *Georgia Power Co.*, 643 F. Supp. 1345, 1374 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538, 1542 (11th Cir. 1988).

In this case, the Pennsylvania PUC has promulgated rules that appear facially consistent with the FERC rules implementing the pertinent statutory commands of PURPA § 210. *See* Petition, App. V, at 336a-37a (PUC rules). Thus, it appears that any effort by West Penn or its customers to petition FERC to require the PUC to "implement" the FERC rules in Pennsylvania would fall on deaf ears. It remains the case that this Court is the only federal court that clearly has jurisdiction to review the issues of federal law raised by this Petition.

7. In the related *Milesburg* Petition, this Court invited the Solicitor General to file a brief expressing the

views of the United States. *See* 114 S. Ct. 2098 (May 23, 1994). That brief, which has not yet been filed, may include FERC's opinions not only on the merits of the questions presented, but also on its own authority and jurisdiction to resolve those questions. Petitioners suggest that the Court hold the three Petitions in abeyance until the Solicitor General files his brief on behalf of the United States in *Milesburg*, and then consolidate the three cases for plenary review.

CONCLUSION

This Petition should be held pending the filing of the Solicitor General's brief in No. 93-1341, and then this Petition, and the Petitions in Nos. 93-1341 and 93-1535, should be granted and consolidated for plenary review.

Respectfully submitted,

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SUPPLEMENTAL APPENDICES

SUPPLEMENTAL APPENDIX A

Portions of West Penn's Brief Filed in the Commonwealth Court in *Burgettstown I*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 2097 C.D. 1989

WEST PENN POWER COMPANY,
v. *Petitioner*,

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

No. 2090 C.D. 1989

ARMCO ADVANCED MATERIALS CORPORATION, *et al.*,
v. *Petitioners*,

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

DEFINITIVE BRIEF FOR PETITIONER, WEST PENN POWER COMPANY

Petition For Review Of Order Of Pennsylvania Public Utility Commission At Docket No. P-880284

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* * * *

B. The Pennsylvania PUC Has No Power Under Federal Law To Modify A Freely Negotiated EEPA Pursuant To PURPA

* * * *

2. *The Modification Of The Terms Of The Freely Negotiated North Branch EEPA Constituted The Ordering Of A Mandated PURPA Contract, And The PUC Failed To Follow The Federal PURPA Regulations Dealing With Avoided Costs*

Under the Federal Energy Regulatory Commission's regulations, purchase rates for mandated PURPA contracts are to be based upon a utility's avoided costs calculated either as of the time that the power is delivered or as of the time that there is a legally enforceable obligation for the delivery of energy or capacity on the part of the qualifying facility:

> Each qualifying facility shall have the option . . .
>
> (2) To provide energy or capacity pursuant to a *legally enforceable obligation* for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) the avoided costs calculated at the time of delivery; or (ii) the avoided costs calculated at the *time the obligation is incurred.* (emphasis supplied)

18 C.F.R. § 292.304(d)(2).

The attempted modification of the North Branch EEPA by the PUC is in substance an order requiring West Penn to enter into a new mandated PURPA contract. The record is completely devoid of evidence addressed to the findings required by the FERC regulations for the entry of such an order, *i.e.*, (1) the determination of the time when North Branch's legally binding obliga-

tion under such new mandated contract arose, and (2) the determination of West Penn's avoided costs as of the time such legally enforceable obligation was incurred. *See* pages 20-36 of the Brief for Petitioner West Penn Power Company in the *Milesburg* appeal (No. 2074 C.D. 1989 and No. 2092 C.D. 1989) for a more complete discussion of the computation of purchase rates under mandated PURPA contracts.

* * * *

SUPPLEMENTAL APPENDIX B

Portions of West Penn's Reply Brief Filed in the Commonwealth Court in *Burgettstown I*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 2097 C.D. 1989

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* * * *

REPLY ARGUMENT

A. *Introduction*

The central controversy in this case is whether, in an Order entered in September 1989, the Pennsylvania Public Utility Commission ("PUC") pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA") has the *power* to order West Penn Power Company ("West Penn") to purchase electric power from North Branch Energy Partners, L.P. ("North Branch") at a price based upon West Penn's avoided costs calculated as of October 1986.

West Penn and North Branch entered into a voluntary Electric Energy Purchase Agreement (the "North Branch EEPA"), dated as of October 15, 1987, which provided for purchase rates based upon West Penn's avoided costs calculated as of the time of an agreement in principle on rates in October 1986. The North Branch EEPA provided that it would automatically terminate if the Financing Closing Date milestone was not met.

In April 1989, North Branch filed a Petition with the PUC (the "Modification Petition"), requesting that the PUC modify the North Branch EEPA milestone dates pursuant to Section 508 of the Public Utility Code, 66 Pa. C.S. § 508 (Purdon 1979). The PUC, in an Order entered three days before the Financing Closing Date deadline, granted the Modification Petition pursuant to Section 508. Also, the PUC ordered that the effect of the Financing Closing Date be "stayed" until the modifications became effective, as Section 508 provides that a modification does not go into effect until 30 days after the PUC's order is served.

The PUC, however, apparently soon realized it had no power under Section 508 to modify the North Branch EEPA. In response to Armco/Allegheny's challenge to the "stay" order, the PUC issued an order upon recon-

sideration in which it asserted that it could have required West Penn to enter into a mandated PURPA contract with the same terms which appeared in the modified North Branch EEPA, including rates based upon West Penn's avoided costs calculated in 1986 (R. 954a).

Now, the PUC has apparently abandoned its Section 508 argument in light of the overwhelming legal authority against it. Instead, the PUC spent almost all of its brief raising arguments in support of its new position that even if its September 1989 Order was in fact an order for a mandated PURPA contract, the mandated contract properly contained rates based upon avoided costs calculated as of the time of "serious negotiations".

West Penn submits that the PUC's new position is as meritless as its old ones, because the PUC has never in fact ordered West Penn to enter into a new contract in this case, and because the PUC is powerless to order a mandated PURPA contract with rates based upon avoided costs calculated as of any time other than the time of power delivery or as of the time that North Branch has incurred a legally enforceable obligation to supply power. Moreover, the practical effect of the PUC's Order is to unduly burden West Penn's ratepayers, as West Penn's avoided costs have dropped significantly since 1986 (West Penn Statement #4 at 10-11; R. 521a-522a).

The PUC, ignoring PURPA's mandate that electric rates be just and reasonable to consumers and in the public interest, has wrongfully attempted to preserve the terms of the now-lapsed North Branch EEPA, in order to enable North Branch to obtain a better price than either (a) the price to which North Branch is entitled in an ordered agreement under federal regulations, or (b) the price that would be available to any other qualifying facility seeking to sell power to West Penn today.

* * * *